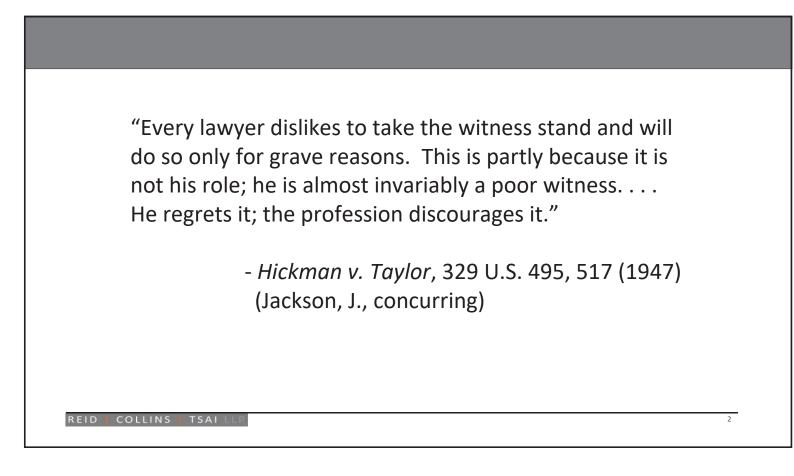
# IN THE HOT SEAT: IN-HOUSE COUNSEL AS WITNESSES

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37th Annual Jay L. Westbrook Bankruptcy Conference November 15, 2018

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### Overview



- How might in-house counsel become a witness?
- What are the risks of in-house counsel serving as a witness?
  - Lawyer-witness rule
  - Confidential information
  - Privileged information
- What if in-house counsel is served with a deposition notice or subpoena?

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## **Becoming a Witness**



When may a witness be deposed and provide admissible testimony?

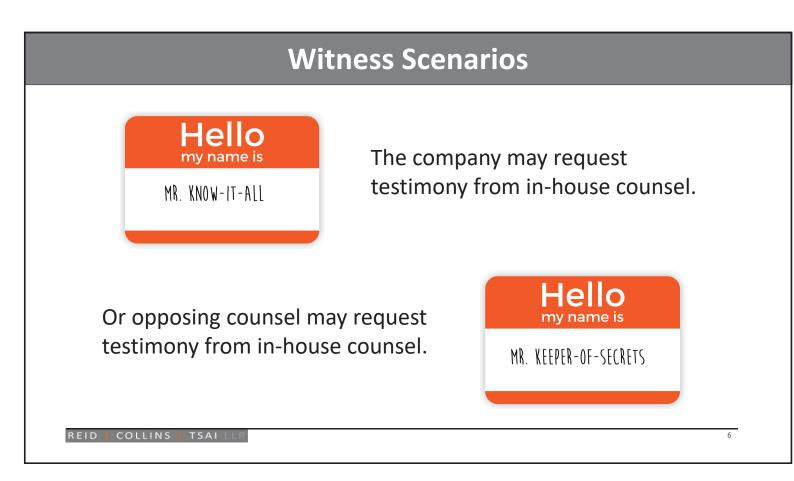
- To be deposed, a witness must have non-privileged information relevant to any claims or defenses under FRCP 26(b)(1).
- To provide admissible testimony, a witness must have "personal knowledge" under FRE 602, and the testimony must be relevant under FRE 401.

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### Witness Scenarios

- Played role in event or transaction
  - Advised management about event/transaction
  - Engaged in negotiations regarding event/transaction
  - Drafted legal documents regarding event/transaction
- Played role after event or transaction, but before commencement of litigation
  - Conducted internal investigation after event/transaction
  - Advised management after event/transaction
- Played role in litigation over event or transaction
  - Gathered and produced responsive documents
  - Verified interrogatory responses
  - > Served as corporate representative at deposition, hearing, or trial

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#### Title search: In the Hot Seat: In-House Counsel as Witnesses

Also available as part of the eCourse <u>Current Issues in Business Bankruptcy: In-House Counsel as Witnesses, Chapter</u> <u>11 Bankruptcy, Adequate Protections, and more</u>

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